**SUBMISSIONS ON BENEFICIAL OWNERSHIP OF COMPANIES**

***By Niall Coburn***

I thank the Australian Government for allowing me to make Submissions on “Increasing Transparency of the Beneficial Ownership of Companies”. I provide an overview of the international direction and the concerns I have about the current loopholes in the system. I do not address your questions as I prefer to provide an overall overview that may be helpful for you. After considering other Beneficial Ownership requirements internationally, it is submitted that Australia should follow the UK approach which is line with the FATF Guidelines as our systems are very similar, it would need that we would not need to “reinvent the wheel”. Additionally, the UK has been granted other powers to divest assets where false information has been provided.

As set out in my Submissions, Australia should play a greater role in ensuring that offshore jurisdictions that have a questionable approach to transparency and shell corporations and other associated entities, have more pressure applied to bring them into line with international best practice. There would be no point of the major G20 countries improving Beneficial Ownership requirements only to allow loopholes to occur in these offshore jurisdictions exposed by the Panama Papers.

## **Introduction**

The Panama Papers raised difficulties about beneficial ownership disclosure and the operation of offshore jurisdictions that are "plugged" into the international banking community. The important point is the steps governments have taken thus far to deal with these concerns.

In mid-February 2017, the arrest of Mossack Fonseca founders, Jurgen Mossack and Ramon Fonseca, highlighted continued concerns about alleged international money laundering and corruption scandals. In an unusual set of events the Panamanian attorney-general has launched an action regarding Mossack Fonseca's operations in Brazil.

These events will be one of the main discussion topics at the [upcoming G20 Summit in Hamburg](https://www.g20.org/Content/DE/_Anlagen/G7_G20/2016-g20-praesidentschaftspapier-en.pdf;jsessionid=AECE5F4498D56448B024DCC827E8780C.s2t2?__blob=publicationFile&v=2). Chancellor Angela Merkel presented the main G20 topics to Cabinet in December 2016, calling for greater cooperation between governments and for transparency in beneficial ownership.

## **Background of abuse of shell companies**

In April 2016, 11.5 million documents were leaked from Mossack Fonseca, a Panamanian law firm and corporate service provider, via an anonymous source. The documents pinpointed weakness in offshore jurisdictions and revealed a "lackadaisical" approach to beneficial ownership requirements. The information related to 240,000 shell companies which were represented by Mossack Fonseca; most were incorporated in the British Virgin Islands (BVI).

The recent arrests took place as international governments were attempting to deal with loopholes in beneficial ownership requirements revealed by the Panama Papers. They also coincided with other high-profile corruption investigations, into Unaoil and into Rolls-Royce's payout of £671 million to settle bribery and corruption claims, which have left regulators wondering what else might emerge from the woodwork.

## **The approach of UK, Europe to the Panama Papers**

In April 2016, David Cameron, then-UK Prime Minister, announced the creation of a cross-agency task force to analyse all the information available from the Panama Papers.

It is unclear how many investigations the Panama Papers have so far prompted in the EU. The European Parliament set up a committee of inquiry in November 2016 but it has yet to produce an interim report. The reactions of individual member states' national parliaments and authorities to the Panama Papers have varied widely. While most member states held debates in Parliament, the Netherlands, Belgium and the United Kingdom all created dedicated bodies to investigate the revelations.

Belgium, Denmark, France, the Netherlands, the UK and other governments are examining matters from a taxation perspective to establish what revenues may be due to their countries. The [upcoming G20 Leadership Summit](https://www.g20.org/Content/DE/_Anlagen/G7_G20/2016-g20-praesidentschaftspapier-en.pdf;jsessionid=AECE5F4498D56448B024DCC827E8780C.s2t2?__blob=publicationFile&v=2) is expected to reinforce the European countries' determination to increase transparency and improve the beneficial ownership rules to combat illicit activities.

France is seeking to implement the EU [Fourth Money Laundering Directive](http://www.complinet.com/global-rulebooks/display/display.html?rbid=1107&element_id=1128) (4MLD) by September 2017, nine months ahead of the mandate deadline. Under 4MLD, member states must centralise data and corporate ownership, increase scrutiny of domestic politicians, assess their exposure to money laundering and terrorist financing and amend their rules on suspicious activity reporting for banks, attorneys, real estate agents and casinos. 4MLD will also strengthen EU governments' powers to seize assets and bolster their oversight of virtual currencies and prepaid cards.

1. **US approach to the filling in loopholes in Beneficial Ownership**

The Financial Crimes Enforcement Network (FinCEN) has issued final rules under the [Bank Secrecy Act](http://www.complinet.com/global-rulebooks/display/rulebook.html?rbid=1154), headed "Customer Due Diligence Requirements for Financial Institutions". These new rules came into force last week and clarify and strengthen customer due diligence requirements for banks, brokers or dealers in securities, mutual funds and futures commission merchants, introducing brokers in commodities and real estate vendors.

The rules contain explicit customer due diligence requirements and include a new requirement to identify and verify the identity of beneficial owners of legal entity customers, subject to certain exclusions and exemptions.

The rules to a certain extent lift the corporate veil on who actually owns companies and entities which establish themselves in the United States. They also require the identification of the natural persons behind companies which are used to pay in cash for high-end residential real estate in some parts of the country. Until these rules were introduced it was unclear who was acting behind shell companies.

The U.S. Department of Justice has launched a number of criminal investigations into various individuals and companies highlighted by the Panama Papers. It is thought that the department is mostly interested in tax avoidance schemes exposed by the leak. Here too, it is unclear how many investigations are being conducted. Preet Bharara, the U.S. attorney for Manhattan, said he had "opened a criminal investigation regarding matters to which the Panama Papers are relevant".

1. **Reaction in Asia-Pacific: Hong Kong and Australia**

In January, the Hong Kong government launched a consultation paper on enhancing the transparency of beneficial ownership of Hong Kong companies. Under the proposals all Hong Kong incorporated companies would be required to obtain and hold beneficial ownership information which would be available for public inspection. Given that the Mossack Fonseca office in Hong Kong accounted for more than 29 percent of its work worldwide, with high-level links to China's elite, much work remains to be done.

In Australia, the Australian Transaction Reports and Analysis Centre (AUSTRAC), the federal government's financial intelligence agency, is part of a coordinated national response to the Panama Papers. AUSTRAC is working with the Serious Financial Crime Action Taskforce (SFCT) to examine more than 1,000 Australian entities identified in the leaked information from Mossack Fonseca, in an attempt to uncover those Australian entities involved in money laundering, tax avoidance or other serious financial or organised crime.

1. **Mossack Fonseca fined in the British Virgin Islands - the need to fill in international loopholes**

In November 2015, the BVI Financial Services Commission (FSC) investigated Mossack Fonseca. It identified eight breaches of anti-money laundering legislation and fined the firm $440,000, the largest penalty ever issued by the offshore financial regulator.

The FSC was unaware what was happening in its own backyard, and the extent to which corrupt money was being funnelled through its jurisdiction. The fine has been criticised as being manifestly low. BVI also resisted calls from Cameron's government to introduce a central register of the owners and beneficial owners of shell companies, although it has recently passed legislation requiring administration firms, such as Mossack Fonseca, to require the BVI law enforcement agencies to make information more easily accessible online. Given the G20 initiatives, offshore jurisdictions may be unable to survive in future unless they lift their compliance standards in line with international expectations.

**Submissions:**

1. **The requirements for improved Beneficial Ownership -**

Professor Joseph Stiglitz, a Nobel Prize-winning economist, and Mark Pieth, a Swiss anti-corruption expert, have called for a complete overhaul of the offshore economy in their [report](http://library.fes.de/pdf-files/iez/12922.pdf), "Overcoming the Shadow Economy", which was prepared for Panama's parliament but then released to other governments and organisations at the end of 2016.

Stiglitz and Pieth have said too little was being done to bring "pariah and rogue states" within international "norms".

"These secrecy havens only exist because the U.S. and Europe allow it: they could not function if they were cut off from our financial system," Stiglitz said.

Stiglitz and Pieth suggested a number of amendments to international regulation:

* National governments should establish registers of the names of directors, registered agents and beneficial owners for all entities incorporated in the country and for all trusts and foundations established within the country. They said it was "crucial" to progress to publicly searchable registers.
* In addition to the supervision of banks and business entities, a state must also adequately supervise intermediary service providers, such as lawyers and accountants and others who act as "enablers".
* In the real estate sector, "beneficial ownership disclosure should be made mandatory, and enforced, for all large real estate cash transactions", the report said. Full and public disclosure of the beneficial owners should be a condition for registering ownership.
* In addition, the Criminal Finances Bill recently introduced in the UK House of Commons introduced the concept of "unexplained wealth orders". These orders will allow agencies tracking financial transactions to force the owner of an asset to explain how they obtained the funds to purchase it. Unexplained wealth orders would also help reveal the owners of real estate.
* All regulatory institutions which administer the exchange of information and supervise financial institutions and associated service providers (accountants, registered agents, attorneys, etc.,) must meet the highest professional standards and have adequate independence and budgetary resources to carry out their duties. It is important to ensure that there are no conflicts of interests affecting government employees and public officials tasked with oversight.
* All countries, and especially developing ones, should participate in all relevant multilateral regulations where international tax and transparency norms are set. In doing so, they should demonstrate a willingness to adopt higher standards of transparency.
1. **Efforts must reach beyond beneficial ownership -**

Governments appear to be taking a piecemeal approach to address beneficial ownership issues in their own jurisdictions rather than coming together to devise a coordinated international approach. As well as dealing with beneficial ownership issues, governments must also deal with problems in offshore jurisdictions themselves by overhauling the regulation of their economies and then closely monitoring their compliance.

The evidence suggests that there has been no slowdown in the level of money laundering. For example, politically exposed persons (PEPs) should in theory be fairly easy to scrutinise, but despite the plethora of compliance and regulations governing offshore jurisdictions, PEPs still appear to find it relatively easy to launder funds.

As just two examples, the Panama Papers uncovered a £1.6 billion money laundering scheme run through Switzerland and the British Virgin Islands in which a St Petersburg cellist and friend of Vladimir Putin is a standing beneficiary for the fortune amassed by the Russian president. In the second example, UK private bank Coutts and Mossack Fonseca provided services to a member of the Brunei royal family accused of stealing billions of dollars from his own country through offshore trusts in Jersey. These examples illustrate the limited due diligence carried out on clients and the ease with which large funds continue to be laundered internationally.

1. **Dealing with offshore jurisdictions -**

The British Virgin Islands (BVI) remain a UK overseas dependency territory but is one of the world's most problematic jurisdictions in terms of compliance. The UK is trying to ensure the BVI introduces appropriate compliance measures along the lines of those developed internationally. It may have to use a strong trade arm if the BVI fails to see the light.

The UK itself has high standards regarding beneficial ownership and has established a register of people with relevant beneficial interests in a company as part of its implementation of Financial Action Task Force (FATF) standards. It has also developed the concept of people with significant control (PSCs), which requires disclosures of PSCs in a register.

These standards need to be extended to the British Virgin Islands, and there need to be public registers of beneficial owners of each corporation, trust, foundation or other entity in every country and the requirement for shell companies and file annual reports of their beneficiaries and the amount of tax they have paid.

1. **Making offences for enablers and conflicts -**

Many administration companies such as Mossack Fonseca, as well as lawyers and accountants, act as the "enablers" of illegal and questionable operations, but little has been done to deal with these operations. There is also a conflict of interest in the BVI's dealings with administration firms, which are by far the largest source of income to its economy. It is difficult to see how it will take effective action on the one hand without cutting out its major source of income on the other.

1. **Dire measures to improve Beneficial Ownership -**

The [priorities](https://www.g20.org/Content/DE/_Anlagen/G7_G20/2016-g20-praesidentschaftspapier-en.pdf;jsessionid=AECE5F4498D56448B024DCC827E8780C.s2t2?__blob=publicationFile&v=2) for the G20 summit due to take place in Hamburg in July 2017 have recognised the need for further measures to fight money laundering and illegal financial flows, not least following the release of the Panama Papers.

Greater cooperation between government agencies will be essential, and more transparency is needed, particularly regarding the beneficial ownership of corporations, trusts, foundations and other legal arrangements. The problem is the need to bring offshore jurisdictions to heel and ensure they adhere to high international standards within tight timeframes.

1. **International political willpower -**

When one considers the seriousness of the loopholes regarding the disclosure of beneficial ownership, the operation of shell structures in offshore jurisdictions and the billions of dollars that governments lose in terms of taxation, the need for a coordinated effort on the part of international governments becomes clear. At the moment, each government appears to be dealing with domestic weaknesses. Greater international political willpower must be brought to bear on offshore jurisdictions to prevent them from corrupting the financial system.

1. **Need for a co-ordinated approach**

Governments are making some headway on beneficial ownership but little has been done to address inadequate compliance, loopholes in beneficial ownership rules and money laundering weaknesses in offshore jurisdictions. Governments appear to have made piecemeal attempts to address problems in their own jurisdictions rather than coming together to devise a coordinated international approach. If Australia is to adopt new Beneficial Ownership Rules, we should learn from countries such as the UK who have those rules already in place and seem to be working effectively.

1. **Conclusion**

To remain consistent, having regards to the above, Australia should adopt the same approach as the UK to Beneficial Ownership that also allows for orders to seize and divest property or assets when there has been a failure of transparency or the information provided was false.

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